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Supreme Court, U.S.
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In The

Supreme Court of the United States

RASH B. GHOSH,

Petitioner,

v.

CITY OF BERKELEY,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

A city council passes a resolution which declares a property owner's home a public nuisance. The property owner seeks court review of the decision, but the courts "conclude that the findings adopted by the Zoning Adjustment Board and the City Council are supported by substantial evidence," and deny relief.

Back in the trial court, the City has filed a cross-complaint for injunction, seeking to enjoin the zoning violation. When the homeowner's appeal is denied, the City files a motion for judgment on the pleadings, asking (among other things) that the court to order the homeowner to alter his attic to conform with the precise "fix" described in the Zoning Board's resolution. No evidentiary hearing is held. The court enters the injunction.

The issue is whether due process is violated when a court issues a permanent injunction without affording the defendant an evidentiary hearing.

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PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SIXTH DISTRICT

Rash B. Ghosh respectfully petitions for a writ of certiorari to the California Court of Appeal to review its decision affirming the trial court's issuance of a permanent injunction, without first affording him an evidentiary hearing, ordering him to make alterations to his attic pursuant to the Berkeley City Council's resolution which declared his house to be in violation of a local zoning ordinance.

OPINION BELOW

The memorandum of the California Court of Appeal appears as Appendix A, and is unreported. The judgment of the California Superior Court appears as Appendix B, and is unreported. The order by the California Supreme Court denying discretionary review appears as Appendix C, and is unreported.

JURISDICTION

Petitioner sought review of the decision by the California Court of Appeal through a petition for discretionary review. The California Supreme Court denied discretionary review of petitioner's state appeal on June 29, 2005. This petition is filed within 90 days of that order, and is timely pursuant to Rule 13.1 of this Court.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1257(a), as a petition for a writ of certiorari to

review the judgment of the highest court of a State where the petitioner claims a right under the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution, Section 1:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A homeowner in Berkeley, California made alterations to his home over a period of several years. Eventually his relationship with city officials became strained, and the

City notified the homeowner that his alterations violated the local zoning ordinance. The homeowner countered that City officials had approved the plans for the work, and the work was done according to plan. The City responded that the individuals who approved the plans did not have authority to make the approvals. Thereafter, a building inspector issued the homeowner a citation, returnable in the local municipal court, alleging that the home was in violation of the City's zoning ordinance.

Several court hearings were held, but before the court could make a decision, the City dismissed the case, and the Zoning Board instituted its own "abatement proceedings." The Board declared that the home was a "public nuisance" as a result of (a) construction of an addition without a use permit; (b) an improper rear yard setback; (c) an improper side yard setback; and (d) excessive lot coverage.

The homeowner appealed the Board's decision to the City Council, which passed its own resolution approving the Board's action. The resolution also stated that the plans did not show an approval of an attic level or third floor.

The resolution ordered the homeowner to take corrective action in three respects:

1. Eliminate the "third story" and "convert it into an attic" in conformance with the Zoning Ordinance.

2. Remove the second floor encroachment into the rear yard setback.

3. Remove the second story balcony.[1]

In addition to ordering Dr. Ghosh to convert the "third story" into an attic that "conformed" with the zoning ordinance, the resolution set forth in detail the manner in which the City Council wanted the homeowner to bring the attic into conformance, by imposing certain specific requirements:

- lowering the roof so that it meets the north and south walls of the building at the level of the second floor ceiling;
- ensuring that the roof as rebuilt does not exceed an interior height of 5'11" at any point in the attic, measured from the floor to the bottom of the rafters or structural truss members, if any;
- removing the part of the third floor/attic which overhangs the front of the building facing McGee;
- closing in all window openings and removing headers and framing for windows in the third floor/attic;
- removing all water and gas plumbing fixtures, supply pipes, waste lines and vents which are located so as to serve the third floor/attic space, except to the extent that they are necessary to serve legally installed fixtures on the first or second floors;

[1] The allegations in the Zoning Board's Resolution concerning the illegal addition were not pursued by the City.

- removing all interior partition walls in the third floor/attic;
- removing all cabinets, remove and [sic] electrical fixtures, wiring and panels in the third floor/attic, except that limited light fixtures to ensure the usability of the attic as a storage space may be permitted, subject to the approval of the Zoning Officer;
- removing the staircase to the third floor/attic and replacing it with a pull down stair. (CT 53; 74.)

Under California law, the homeowner's only remedy to contest the findings of an administrative agency such as those made by the City Council is to seek review in the superior court through a petition for administrative mandate. No new evidence can be presented, and the inquiry by the court is limited to whether the administrative agency abused its discretion in reaching its "findings," and whether the findings were supported by substantial evidence. *Fukuda v. City of Angels*, 20 Cal.4th 805, 824 (1999); Cal. Proc. Code § 1094.5(b).

The homeowner proceeded to file such a petition.

The City filed a cross-complaint, praying for an injunction ordering the homeowner to comply with the City Council's resolution.

The City then filed a pre-trial motion for judgment on the mandate petition, and the superior court granted the motion. The court found that the evidence supported the administrative decision by the City Council, and that there was no abuse of discretion.

The homeowner unsuccessfully appealed that ruling.

Upon denial of the appeal, the City moved for judgment on the pleadings on its cross-complaint for injunction, asserting that the court's finding that the administrative decision was supported by the substantial evidence constituted *res judicata* or collateral estoppel on the cause of action for injunction. More specifically, the City's motion asserted that with respect to the injunction cause of action "the appropriate relief therefore" was *res judicata*.

The homeowner did not contest the injunction insofar as it related to the setback lines. But he opposed the City's attempts to obtain an injunction insofar as it related to his attic. He asserted that the home could easily be brought into compliance with the zoning ordinance without the detailed "fixes" contained in the City Council's ordinance, and that before an injunction could issue he had a right to be heard on the traditional equitable issues in a suit for injunction, such as the adequacy of the remedy of law, whether there was irreparable harm, whether the scope of the relief sought was overbroad, and whether the balance of equities favored the plaintiff. He also asserted that a judgment on the pleadings was not a proper vehicle to obtain an injunction, and that the issues had to be determined by a court after a hearing at which he could present evidence.

The court denied the homeowner's request for an evidentiary hearing and granted the City's motion. The court then issued an injunction ordering the homeowner to abate the nuisance on his property "in full compliance with City of Berkeley City Council Resolution No. 61,350-N.S., which is attached hereto as exhibit A and incorporated by reference."

Once again the homeowner appealed, and once again his appeal was unsuccessful.

REASONS FOR GRANTING THE PETITION: CAN A MUNICIPALITY OBTAIN AN INJUNCTION AGAINST A PROPERTY OWNER WITHOUT THE PROPERTY OWNER FIRST BEING GIVEN THE OPPORTUNITY TO PRESENT EVIDENCE IN HIS DEFENSE?

The significance of what happened here should not be underestimated.

The City of Berkeley was able obtain an injunction against a property owner without a court ever having heard evidence on the matter.

Before the extraordinary remedy of injunction will be granted, the courts universally insist upon determining whether the remedy at law is inadequate, whether irreparable harm will result, whether the relief sought is overly broad, and whether the equities weigh in favor of the plaintiff. *See Beacon Theaters v. Westover*, 359 U.S. 500, 506-507 (1959). Here the court never exercised any of those functions. It simply attached the City Council's resolution as "Exhibit A" to its order, and commanded the property owner to comply with the terms of the resolution.

The superior court did no more than approve the City Council's declaration that the property owner was violating the law, and then approve the City's choice of specific remedies. The court never heard the property owner's affirmative defenses to the complaint for injunction. Nor did the property owner ever have the opportunity to present evidence that his home could be brought into compliance with the zoning ordinance without following

the detailed construction methods contained in the City Council's resolution.

The traditional means to enforce a zoning ordinance is through a criminal or quasi-criminal proceeding, or through a civil action for declaratory relief and injunction. Both those methods give the property owner his day in court, and the right to have the court determine the credibility of the witnesses and the weight of the evidence. This traditional process gives the judicial branch of government a check on the power of the legislative branch of government.

Had the City sought an injunction through the traditional suit for injunction, the property owner would have been able to exercise all the rights of a litigant, including the opportunity to show how he could comply with the zoning ordinance without, say, replacing the attic stairs with a pull-down stair. "A legislature may not, under the guise of the police power, impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities." *McKay Jewelers, Inc. v. Bowron*, 19 Cal.2d 595, 601 (1942).

Here the property owner was deprived of the rights that are afforded to every other litigant.

Here the City undertook to make its *own* conclusion that the ordinance had been violated, through a declaration in a resolution by the City Council itself. Having bypassed the fact-finding function of the judiciary, the City is now able to seek enforcement of its unilateral action through the courts.

Access to the courts is protected by the First Amendment's guarantee of the right to petition the government